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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petitioner, Anna Desper, administratrix of the estate of Thomas J. Desper, Jr., deceased, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Court of Appeals for the Seventh Circuit in the above case, which judgment was entered on March 20, 1951 (R. 283), and became final upon the denial by that court of petitioner's application for a rehearing on May 14, 1951 (R. 286).

2. For a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, for that purpose.

In this behalf, petitioner shows:

I.

Opinion Below.

The opinion of the Court of Appeals is reported in 188 F. 2d 177; it will also be found at R. 274-282, and is attached as an appendix to this petition.

II.

Jurisdictional Statement.

This Court's jurisdiction is invoked under 62 Stat. 928, 28 U. S. C. A. Sec. 1254. The judgment is a decision as to rights claimed by petitioner under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688.

III.

The Questions Presented.

1. May an administratrix (decedent's mother in the instant case) maintain an action under the Jones Act for the death of her intestate who was killed while engaged in the course of his employment in fitting out, for use in navigation, boats which he had been hired to operate during the ensuing season and which had been at the time of the accident in question definitely assigned for such use?

2. Does the Jones Act, the relevant part of which provides:

> "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. * * *."

extend to seamen injured in the course of their employment the principles of recovery established for railway employees, as interpreted by this Court, under the original Federal Employers' Liability Act, and under that Act as amended in 1939?

3. Does the 1939 Amendment of the Federal Employers' Liability Act, which grants to railroad employees the benefits of that Act if any part of their duties "shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce * * *" confer a corresponding benefit on seamen who suffer injury in the course of their employment if any part of their employment "shall be the furtherance of" navigation "or shall in any way directly or closely and substantially affect such" navigation?

4. If the principles of recovery established for railway employees under the F.E.L.A. and under that Act as amended have been extended to seamen under the Jones Act and if, as this Court has consistently and uniformly held throughout the years, railway employees while preparing engines, trains and cars for use in interstate commerce come within the purview of that statute, on what basis may the Court of Appeals hold that the plaintiff's intestate, who was hired as a licensed navigator, while engaged in the course of his employment in preparing the boats which he had been hired to operate and which had been definitely assigned for such use, was without the scope of the Jones Act?

5. Is there any evidence to support the jury's verdict that plaintiff's intestate was a seaman within the meaning of the Jones Act?

6. Since this Court has decided that:

The principles of recovery established for railway employees under the F.E.L.A. have been extended to seamen under the Jones Act;

The policy of liberal construction of the Jones Act has been consistently maintained by this Court both before and since the passage of the Longshoremen's Act;

The construction of the Longshoremen's Act by this Court leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board or on shore;

There is nothing in the legislative history of the Jones Act to show that the words "in the course of his employment" do not mean what they say or that they were to be restricted to injuries occurring on navigable waters, may the Court of Appeals properly hold that the plaintiff's decedent in the instant case who came to his death while engaged in fitting out the vessels which he had been hired to operate and which had been definitely assigned for use in navigation, was without the scope or purview of the Jones Act?

Statutes Involved.

The Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688, provides:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable * * *."

The 1939 amendment of the Federal Employers' Liability Act, 53 Stat. 1404; 45 U. S. C. A. Sec. 51, provides:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

IV.

Summary and Short Statement of the Matter Involved.

This is an action under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688, to recover for the wrongful death of plaintiff's intestate, her son, who was killed April 26, 1948, by an explosion of a fire extinguisher, while engaged, in the course of his employment by the defendant, in preparing the latter's sightseeing vessels for use during the summer season of 1948. There was a verdict for plaintiff for $25,000, upon which the District Court entered judgment. The Court of Appeals reversed and remanded with directions to enter judgment for the defendant, on the ground that decedent was not a seaman within the meaning of the Jones Act, at the time of his death, because the defendant's vessels were not then engaged in navigation. It was held, also, that the 1939 amendment of the Federal Employers' Liability Act was inapplicable in determining decedent's status as a seaman, and that the trial court's instructions reflecting the contrary view were erroneous. As the defendant's negligence is undisputed, the only ultimate question is whether decedent was a seaman within the meaning of the Jones Act, at the time of his death, so as to entitle the administratrix, his mother, to its benefits.

We adopt the following statement of the Court of Appeals (R. 274, 275, Opinion pp. 1, 2):

"Defendant is an Illinois corporation engaged in the operation of sight-seeing motor-boats on the Illinois River in the vicinity of Starved Rock. Plaintiff's intestate was first employed by defendant in April, 1947. He assisted in the preparation of the latter's motor launches and barges for the summer season, which extended from June 1 to the end of October, and, after procuring, on June 17, 1947, a Department of Commerce license 'to operate or navigate motor boats carrying passengers for hire', served as an operator of defendant's launches for the balance of the 1947 season. Defendant had five such vessels, manned by licensed crewmen and operated pursuant to Coast Guard regulations. At the close of the season, Desper helped take the boats and barges off the river and prepare them for the winter. The barges, none of which had any motive power, were floated into a shallow inlet known as Edwards Run, which was utilized by defendant as winter quarters, and there anchored to the bank; the motor launches were taken out of the water and blocked up on marine tracks on land adjacent thereto. This work was completed and Desper's employment terminated on December 19, 1947.

On March 15, 1948, Desper again entered defendant's employment. Although there was testimony to the effect that he was hired for the season and was to be employed as an operator once the boats were in the water, the work he actually performed from the date of his re-employment until his death consisted of cleaning, painting, varnishing and water-proofing the vessels and engaging in various other related activities necessarily involved in readying them for the summer season. On April 26, the date on which the accident occurred, the launches were still blocked up on rails and the barges lying in Edwards Run."

The following additional facts are relevant. It was the usual practice of the defendant to reengage the operators employed during the preceding season (R. 119) and to have them help get the boats ready for navigation (R. 115, 116). Desper was paid at the same rate for fitting out the boats as he was for operating them (R. 117-119, 123, 179). Seamen operating boats of this kind on the Illinois River never

worked under seamen's articles (R. 135) or ship's discipline, nor did they live on the boats. The fitting out work was almost finished at the time of the accident (R. 63, 64, 91) and although the work was interrupted for almost a week (R. 75) the boats were launched and running within a week or ten days after Desper was killed (R. 181). The 1948 season began May 9 (R. 181) several weeks earlier than the preceding year. (Plaintiff's Exhibit 1, R. 219, a photograph looking northeast, shows the physical conditions substantially as they existed at the time of the accident, R. 58).

Although it is immaterial, in view of *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, whether the accident occurred on navigable waters, there was evidence that Edwards' Run was navigable (R. 78, 79). Consumers' Run, into which the marine track led, was navigable (R. 53, 100, 114).

The Workmen's Compensation proceedings before the Industrial Commission of Illinois, while entirely immaterial to the issues, were initiated by the defendant in an attempt to compel plaintiff to accept compensation under the state Workmen's Compensation Act. The plaintiff, later, after the commencement of the present suit, also filed an application for compensation, as a precautionary measure to preserve her rights. Prior to the date set for hearing we filed a written motion before the Commission, supported by affidavit, to have the hearing continued until the plaintiff's right to maintain her suit under the Jones Act had been determined in the Federal Courts. Plaintiff's motion was denied and she was compelled, at the defendant's behest, to proceed with her evidence before the Industrial Commission. There has been no final award of compensation, and plaintiff's petition for review of the arbitrator's finding, alleging the Commission is without jurisdiction, is pending. Plaintiff's right to pursue her remedy under the Jones Act in the federal courts is not affected by pending compensation proceedings. *Marceau* v. *Great Lakes*

Transit Corp., 146 F. 2d 416, 418 (2d Cir.) cert. den. 324 U. S. 872. *Davis* v. *Department of Labor*, 317 U. S. 249 (construction worker dismantling abandoned bridge), *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, and *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854 (shipyard workers repairing completed vessels) relied on by the defendant in the Court below to support its argument that the District Court should have stayed its proceedings, were all cases in which the injured workman or his widow sought workmen's compensation and there was no federal suit under the Jones Act. The state jurisdiction was upheld under the so-called doctrine of local concern. None of the employees in these cases was hired or served as a member of a crew in any capacity, and they are not authority for any purpose in the instant case.

V.

Reasons Relied On for the Allowance of the Writ.

This decision results in denying to seamen injured during the fitting out period, or to their dependents if they are killed, the benefits of the Jones Act which it was the obvious intention of Congress to apply to as large a group of seamen (longshoremen and harbor workers excepted) as was constitutionally possible. The Court of Appeals not only substituted judicial for jury determination of the fact question of who is a seaman within the meaning of the Jones Act, by narrowly construing the term navigation, but also failed to apply the principles of recovery in analogous F.E.L.A. cases under which the benefits of that Act have always been accorded to railway employees engaged in the comparable work of preparing engines, trains and cars for use in interstate commerce. See *Chicago and N. W. R. Co.* v. *Bower*, 241 U. S. 470; *Southern R. Co.* v. *Lloyd*, 239 U. S. 496; *New York Cent. and H. R. R. Co.* v. *Carr*, 238 U. S. 260, 263; *Seaboard Air Line Ry.* v. *Padgett*,

236 U. S. 668; *Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S. 42; *Norfolk and W. R. Co.* v. *Earnest*, 229 U. S. 114.

The present decision is directly in conflict with the policy of liberal construction of the Act declared by this Court and continuously adhered to in the following cases: *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Jamison* v. *Encarnacion*, 281 U. S. 635; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Warner* v. *Goltra*, 293 U. S. 155; *The Arizona* v. *Anelich*, 298 U. S. 110, 123; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36; and *Swanson* v. *Marra Bros.*, 328 U. S. 1. The Court of Appeals has erroneously interpreted this Court's decision in the *Swanson* and *O'Donnell* cases as a retreat from the liberal position taken in the *Haverty* case.

The principle established by this Court's uniform construction of the F.E.L.A., applied in the admiralty setting, confers the benefits of the Jones Act on seamen, hired as members of a crew, whose work at the time of injury is so closely related to navigation as to be practically a part of it.

The word "employment" as used in the F.E.L.A. had been construed by this Court long before the Jones Act was passed, and, of course, even longer before the 1939 amendment to the F.E.L.A. In *Shanks* v. *D. L. and W. R. R.*, 239 U. S. 556, 558, it was held that "the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." This rule was adhered to in *So. Pac. Co.* v. *Ind. Acc. Com.*, 251 U. S. 259, 263; *Ind. Com.* v. *Davis*, 259 U. S. 182, 185; *B. and O. S. W. R. R.* v. *Burtch*, 263 U. S. 540, 543. Congress must be presumed to have

used the word "employed" in the sense in which this Court had already construed it under the F.E.L.A.

Thus we find that at the time the Jones Act was passed, adopting the F.E.L.A., a uniform judicial construction of this Act required the courts, in construing it, to include within its purview not only those employees whose tasks were actually interstate, but also those whose tasks were so closely allied to such commerce as to be a part thereof. It must be presumed that Congress was aware of this rule of construction, and in adopting the statute adopted the rules of construction as well. That the construction was in fact adopted becomes apparent, we think, from the decisions hereafter cited, where the benefits of the Jones Act were extended to seamen who were working on a vessel in dry dock.

The determination of the relationship between the work a railroad employee was doing and interstate commerce was one of the principles of recovery already established for railroad employees which was to be applied in the new admiralty setting.

In *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, the question was whether persons maintaining a toll bridge were "engaged in commerce" within the meaning of the Fair Labor Standards Act. The court there referred to the numerous decisions construing the F.E.L.A., and held that the test evolved in those cases, i.e., whether "the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it," should be applied, and should govern the interpretation of the Fair Labor Standards Act. In discussing the contention that the F.E.L.A. and the Fair Labor Standards Act were not related, and therefore the construction of one was not applicable to the other, the court said, pp. 131, 132:

> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pederson* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

Every consideration which this Court relied on in the *Overstreet* case is present, with even greater force and applicability, in our case. Not only did Congress have the decisions construing the F.E.L.A. brought to its attention when it passed the Jones Act, but by adopting that Act it adopted the settled judicial construction of it.

The F.E.L.A. used the language "employed * * * in such commerce." The Jones Act speaks of the "course of his employment." Obviously, Congress was legislating concerning "employment" in each case, and therefore the earlier decisions construing the word must be presumed to be adopted in the later Act.

In adopting an earlier act, either expressly or by implication, "Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Shapiro* v. *United States*, 335 U. S. 1, 16.

The applicable principle is that work so closely related to the basic employment as to be practically a part of it entitles the employee to the benefits of the Act. In the one case it is employment in interstate commerce, in the other employment as a seaman. The principle is as readily applicable in the one case as the other. It was the duty

of the Court of Appeals to apply it in this case. *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36.

The cases cited by the Court of Appeals do not support its conclusion that decedent was not a seaman.

The Court cites *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36; *Swanson* v. *Marra Bros.*, 328 U. S. 1; *Frankel* v. *Bethlehem-Fairfield Shipyard, Inc.*, 46 F. S. 242, 249, affirmed 132 F. 2d 634 (4th Cir.) cert. denied 319 U. S. 746; *Hawn* v. *American S. S. Co.*, 107 F. 2d 999 (2d Cir.); *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, 187 (6th Cir.); and *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.) in support of its conclusion that decedent was not engaged in maritime service and was not a member of a crew at the time of his death. None of these cases involves a situation in which a licensed navigator, definitely hired to operate boats, was injured while engaged in the necessary preparatory work of getting them ready for operation. There is no adjudicated case, so far as we can determine, denying a right of recovery under such circumstances.

We submit the Court of Appeals misinterpreted the *O'Donnell* and *Swanson* cases in construing them to require that a ship be engaged in navigation to give the injured employee status as a member of a crew. This Court stated in the *O'Donnell* case (Opin. pp. 42-43) that the admiralty jurisdiction of a Jones Act suit depends on the nature of the service and its relation to the operation of a vessel plying in navigable waters. This Court also said, p. 39: "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters." The test in determining the applicability of the Jones Act is the nature of the service the seaman is engaging in at the time of his injury, not the location of the vessel

nor the place where the injury occurred. This Court surely did not intend to hold, in the light of the quoted statement, that the vessel must be plying in navigable waters or actually engaged in navigation at the time of the injury. If the service is performed by a seaman hired as a member of a crew, and is necessary to the operation of the vessel, it is within the admiralty jurisdiction. The right to the benefits of the Jones Act does not depend on whether the ship is technically in navigation, but on whether the seaman is a member of its crew and his service is of a maritime nature.

Frankel v. *Bethlehem-Fairfield Shipyard, Inc.*, 46 F. S. 242, 249, affirmed 132 F. 2d 634 (4th Cir.) involved an injury to a shipyard employee engaged in new construction, which this Court has always declared to be non-maritime. *Thames Towboat Co.* v. *The Francis McDonald*, 254 U. S. 242. In *Hawn* v. *American S. S. Co.*, 107 F. 2d 999 (2d Cir.) the ship had been out of commission a year, with no prospect of being returned to service (compare *Gonzales* v. *U. S. Emergency Fleet Corp.*, 3 F. 2d 168, 170, E. D. N. Y.) and plaintiff was a day laborer helping to load her for storage purposes. *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, 187 (6th Cir.) involved an injury to an employee who was helping to lay up the ship at the close of the navigation season. The Court implied that if the work had been done in preparation for navigation a recovery would have been allowed under the Jones Act. In *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.) the employee was killed while helping to fit out a Great Lakes steamer for navigation. An award of compensation under the Longshoremen's Act was upheld on the ground that the decedent was not a member of the crew because the crew had not yet been chosen at the time of his death. This is in contrast with the instant case, in which decedent was definitely hired as a crew member at the beginning of his employment. The minor factors that

decedent was not working under articles or ship's discipline, or living on board, are not significant, since river-boat operators did not customarily do so. *Daffin* v. *Pape*, 170 F. 2d 622, 625 (5th Cir.).

Decedent's Work Was Clearly Maritime.

A contract to repair a ship is a maritime contract, whether the repairs are made while she is afloat, in dry dock, or on land, *North Pac. S. S. Co.* v. *Hall Bros.*, 249 U. S. 119, 128. *The Steamship Jefferson*, 215 U. S. 130, 142, 143. The service is maritime because of its direct and intimate connection with navigation and commerce. *John Baizley Iron Works* v. *Span*, 281 U. S. 222, 232. It has such connection even though the vessel is laid up a long time and the repairs are extensive. *New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96. And see also, *Hillcone S. S. Co.* v. *Steffen*, 136 F. 2d 965 (9th Cir.). They are maritime if there is a present intention to put the ship in service and the work is directed to that end. See *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. 2d 991, 995 (1st Cir.). It is otherwise when a ship is permanently laid up and intended to be scrapped. *Gonzales* v. *United States Emergency Fleet Corp.*, 3 F. 2d 168, 170 (E. D. N. Y.). Whether the ship be regarded as in or out of navigation during the period of repairs or reconditioning is unimportant as long as the service is maritime. The work decedent was performing on defendant's vessels at the time of his death was not only directly in aid and furtherance of navigation but was an essential prerequisite to their use in navigation and without which they could not be safely operated.

The decision of the Court of Appeals is in conflict with Hunt v. United States, 17 F. S. 578, 91 F. 2d 1014 (2d Cir.), cert. denied 302 U. S. 752; Jones v. Shepherd, 20 F. S. 345 (S. D. Miss.); United States v. Lindgren, 28 F. 2d 725 (4th Cir.), affirmed 281 U. S. 38; Daffin v. Pape, 170 F. 2d 622

(5th Cir.); and Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597 (6th Cir.), cert. denied 328 U. S. 858.

In *Hunt* v. *United States*, 17 F. S. 578, 91 F. 2d 1014 (2d Cir.), cert. denied 302 U. S. 752, the employee was injured while cleaning and scraping a ship in drydock. He had signed no shipping articles, but took his chances on being selected as one of the crew when the ship should be ready to begin her next voyage. A recovery under the Jones Act was allowed. In *United States* v. *Lindgren*, 28 F. 2d 725, 728 (4th Cir.), affirmed 281 U. S. 38, the decedent, who had been hired as third mate, was killed while helping to repair the ship, which was in drydock in preparation for her next voyage. The Court of Appeals held there was no doubt he was a member of the crew and a recovery under the Jones Act would have been sustained if proof of dependency could have been made.

In *Jones* v. *Shepherd*, 20 F. S. 345, 346 (S. D. Miss.) the decedent was drowned while helping to load coal onto a vessel preparatory to a voyage. The ship had been laid up over a month, during which he lived at home, but before that he had been a member of the crew, and it was held that when he returned and engaged in the preparatory work it was a reasonable inference that he immediately became a member of the crew in the same capacity and at the same rate of pay and in the performance of the same kind of duties he had theretofore been performing.

In *Daffin* v. *Pape*, 170 F. 2d 622 (5th Cir.), decedent, carried on the payroll of defendant's radio station as handyman and porter, killed while preparing defendant's yacht for a trip on which he was to be carried along to cook, serve drinks, do general work and relieve the captain at the helm, was held as a matter of law to be a member of the crew.

Weaver v. *Pittsburgh Steamship Co.*, 153 F. 2d 597 (6th Cir.), cert. denied 328 U. S. 858, was an action for overtime

compensation under the Fair Labor Standards Act. The plaintiff had worked under signed shipping articles as a fireman on Great Lakes Steamships during the fit-out and sailing periods, and until the end of the lay-up period. He was held to be a seaman during the entire time. Although much stress is laid on the fact that the employee worked under articles (a matter of no significance in the instant case in view of the contrary custom), the Court also approved and followed the *Hunt, Jones* and *Lindgren* cases. We submit all of these cases are indistinguishable, in principle, from the instant case, where the work done was just as directly and intimately connected with navigation. That the boats were on a marine track rather than in drydock is not significant. *Cont. Cas. Co.* v. *Lawson*, 64 F. 2d 802 (5th Cir.); *Maryland Cas. Co.* v. *Lawson*, 101 F. 2d 732 (5th Cir.).

The 1939 amendment of the Federal Employers' Liability Act is applicable in suits under the Jones Act.

A question presented for the first time in this case, which we believe this Court should decide, is whether the 1939 amendment of the F.E.L.A. is applicable in suits under the Jones Act.

The 1939 amendment is indicative of the intent of Congress to confer and extend the right of action under the F.E.L.A. to all whose duties, at any time or place, would entitle them to come within its purview. It is also indicative of the intent of Congress to confer and extend the right of action for wrongful death created by the Jones Act to all seamen whose duties, at any time or place, would entitle them to its benefits. The Jones Act expressly incorporates all statutes of the United States conferring or regulating the right of action for death in the case of railway employes. The 1939 amendment broadens the concept of employment within the meaning of the F.E.L.A. so as to confer its benefits on a larger group of employees, and

we submit it must work a corresponding enlargement of the concept of seaman so as to include employees any part of whose duties are those of a member of a crew.

In *California* v. *Zook, et al.*, 336 U. S. 725, 728, this Court recognized the power of Congress to "redefine the areas of national and local predominance." The passage of the 1939 amendment of the F.E.L.A. was an exercise of the Congressional power in the field of the relationship of common carriers by railroad to their employees. The principle by which the area of national predominance was enlarged was that the entire scope of the employee's duties was to be considered in determining his right to the benefit of the Act. The Congressional mandate requires a corresponding enlargement of the area of national predominance in the field of the relationship of shipowners to their employees. The Jones Act is to be construed so as to enlarge, rather than restrict, admiralty's protection to its wards. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248.

The decision of the Court of Appeals holding the 1939 amendment of the F.E.L.A. inapplicable in Jones Act cases is in conflict, in principle, with *Nordquist* v. *U. S. Trust Co. of N. Y.*, 188 F. 2d 776 (2d Cir.). There the plaintiff sued the executor of a deceased shipowner, under the Jones Act, to recover for the wrongful death of plaintiff's decedent. The defendant moved to dismiss on the ground that since there was no survival provision in the Jones Act, the action abated with the death of the tort feasor. The Court of Appeals held that the provision of the F.E.L.A. (45 U. S. C. A. Sec. 57) that suit might be brought against "receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier" was by implication a survival statute and should be read into the Jones Act so as to permit suit against the executor of a deceased shipowner. Receivers of common carriers by railroad were equated with executors of shipowners, and the principle of survival carried over into the

Jones Act. This was a more liberal application of principle than the District Court made in the instant case in giving the administratrix the benefit of the 1939 amendment of the F.E.L.A.

The Court of Appeals' refusal to apply the amendment was on the ground that it was not a statute conferring or regulating the right of action for death in the case of railway employees (Opinion p. 7). It seems clear that the amendment confers the right of action on those who would not otherwise come within its purview. But even if the amendment were not applicable to Jones Act suits, the error in applying it would be harmless since the decedent was under the Jones Act by virtue of principles well established in analogous F.E.L.A. cases before its passage.

The Court of Appeals has substituted its judgment for that of the jury on the fact question of whether decedent was a seaman within the meaning of the Jones Act at the time of his death.

While the *O'Donnell* and *Swanson* cases have confined the benefits of the Jones Act to seamen who are members of a crew, this Court recognized in *South Chicago Coal Co. v. Bassett,* 309 U. S. 251, 258, 260, that the term "crew" does not have an unvarying legal significance, and that whether one is a member of a crew is a question of fact depending on all the circumstances. The term was interpreted broadly in *Norton* v. *Warner Co.,* 321 U. S. 565, and in *Cantey* v. *McLain Line,* 312 U. S. 667, reversing 32 F. S. 1023, 114 F. 2d 1017, on the authority of the *Bassett* case. The question has been held to be one of fact requiring an affirmance of a jury's finding if there is any evidence to support it, in *Gahagan Const. Corp.* v. *Armao,* 165 F. 2d 301, 305, 307 (1st Cir.), cert. den. 333 U. S. 876; *Bowen* v. *Shamrock Towing Co.,* 139 F. 2d 674 (2d Cir.); and *Schantz* v. *American Dredging Co.,* 138 F. 2d 534 (3rd Cir.).

This Court's decisions restoring the historic role of the jury in passing on disputed questions of fact and in drawing inferences from proven facts in F.E.L.A. cases require that the verdict of the jury and the judgment of the District Court be sustained in the instant case. See *Wilkerson* v. *McCarthy*, 336 U. S. 53, 71; *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey* v. *Central Vt. Ry. Co.*, 319 U. S. 350; *Lavender* v. *Kurn*, 327 U. S. 645; *Ellis* v. *U. P. R. Co.*, 329 U. S. 649; *Urie* v. *Thompson*, 337 U. S. 163.

We submit that since the Jones Act, even if strictly construed, expressly grants to seamen the same common law remedy to recover for personal injury suffered in the course of their employment, as that given to railway employees under the provisions of the F.E.L.A., as amended in 1939, the right of recovery of such employees if any part of their employment is in interstate commerce, must likewise be similarly construed and rendered applicable to seamen, any part of whose duties is in furtherance of navigation; to hold otherwise would nullify the Congressional mandate.

The words "vessel plying in navigable waters", which the Court of Appeals lifts out of their context in the *Swanson* case, must be construed in the light of the question there being decided, and the decisions in other cases. Certainly the court did not mean to imply that a vessel must actually be plying in navigable waters at the very instant of the accident. Such a construction would exclude a number of cases which arise in harbor, and in which recovery has been uniformly sustained.

The statement by the Court of Appeals (Opinion p. 6) that this Court "has retreated from the position taken in the *Haverty* case and has narrowed the Jones Act concept of 'seaman' to the point where it includes only one who is a member of the crew of a vessel plying in navigable

waters" * * * or (Opinion p. 8) "a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation" is quite misleading to say the least. As heretofore pointed out, this Court has consistently adhered to the position taken in the *Haverty* case. Congress, by the enactment of the Longshoremen's Act, excluded from the purview of the Jones Act a class of employees which had previously been allowed to participate in its benefits and left unaffected the rights of other seamen to recover under the Jones Act for injuries suffered while engaged in the course of their maritime employment. *Swanson* v. *Marra*, 328 U. S. 1. The nature of decedent's employment and "its relationship to the operation of vessels plying in navigable waters" brought him squarely within the test essential to a right to recover under the Jones Act as prescribed by this Court in the *O'Donnell* and *Swanson* cases.

Conclusion.

This case raises important questions of federal law under the Jones Act which this Court has not passed upon, and certiorari should therefore be granted. *De Zon* v. *American President Lines*, 318 U. S. 660, 661. The decision of the Court of Appeals erroneously deprives plaintiff of her right of recovery under that Act. Petitioner therefore urges that the writ prayed for in the petition be issued; that the judgment of the Court of Appeals be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Petitioner.

APPENDIX.

In the
United States Court of Appeals
For the Seventh Circuit

OCTOBER TERM, 1950, JANUARY SESSION, 1951.

No. 10257

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,
Plaintiff-Appellee,
vs.
STARVED ROCK FERRY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 20, 1951

Before KERNER, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* This is an action under the Jones Act, 46 U.S.C.A., Sec. 688, for damages for the death of plaintiff's intestate, Thomas J. Desper, Jr., as a result of injuries sustained by him in the course of his employment by defendant. A jury found for plaintiff, assessing her damages at $25,000. From the judgment entered on the verdict, defendant appeals.

Defendant is an Illinois corporation engaged in the operation of sight-seeing motor-boats on the Illinois River in the vicinity of Starved Rock. Plaintiff's intestate was first employed by defendant in April, 1947. He assisted in the preparation of the latter's motor launches and barges for the summer season, which extended from June 1 to the end of October, and, after procuring, on June 17, 1947, a Department of Commerce license "to operate or navigate motor boats carrying passengers for hire", served as an operator of defendant's launches for the balance of the 1947 season. Defendant had five such vessels,

manned by licensed crewmen and operated pursuant to Coast Guard regulations. At the close of the season, Desper helped take the boats and barges off the river and prepare them for the winter. The barges, none of which had any motive power, were floated into a shallow inlet known as Edwards Run, which was utilized by defendant as winter quarters, and there anchored to the bank; the motor launches were taken out of the water and blocked up on marine tracks on land adjacent thereto. This work was completed and Desper's employment terminated on December 19, 1947.

On March 15, 1948, Desper again entered defendant's employment. Although there was testimony to the effect that he was hired for the season and was to be employed as an operator once the boats were in the water, the work he actually performed from the date of his reemployment until his death consisted of cleaning, painting, varnishing and water-proofing the vessels and engaging in various other related activities necessarily involved in readying them for the summer season. On April 26, the date on which the accident occurred, the launches were still blocked up on rails and the barges lying in Edwards Run. The largest of the latter was a houseboat in which defendant's manager had year-round living quarters and which was also used as a machine and tool shop, warehouse, ticket office and waiting room. Five or six men were on this barge, spraying life preservers which were to be used on the sight-seeing boats, and defendant's president, one Birkenbuel, was also there, working on a fire extinguisher. This extinguisher exploded, killing Birkenbuel and plaintiff's intestate.

Both plaintiff and defendant filed applications for adjustment of claim with the Industrial Commission of Illinois, the defendant on January 6, 1949, and the plaintiff on March 28, 1949, seven days after filing her complaint in the instant action in the District Court. After hearing, an arbitrator decided that the provisions of the Illinois Workmen's Compensation Act were applicable and that under Section 7 (b) thereof (Ill. Rev. Stat. 1949, Ch. 48, Sec. 144 (b)), plaintiff was entitled to compensation in the amount of $19.50 per week for 266 weeks and $13.00 for one additional week. Defendant's tender of the amount of compensation which had already accrued and its offer

to pay the balance of the award were immediately rejected by plaintiff, who filed with the commission a petition for review, alleging that the commission lacked jurisdiction and praying that the order be vacated. The pendency of this petition for review was urged by defendant in support of its motion to stay the proceedings in the instant case,—a motion predicated on its contention that the commission's decision, subject to review by the courts of Illinois, would be determinative of plaintiff's right to the relief prayed. The District Court, however, overruled the motion and the suit proceeded to judgment as related.

It is defendant's position that plaintiff's intestate, Desper, was not a "seaman" within the meaning of the Jones Act and that plaintiff, therefore, has no right to maintain an action for damages for his death in the course of his employment, but has available to her only the remedy afforded by the Illinois Workmen's Compensation statute. It is urged that the District Court erred in taking the contrary position and, more particularly, in denying defendant's motion for a stay, in refusing to direct a verdict for defendant, in giving certain instructions submitted by plaintiff and failing to give an instruction offered by defendant, and in overruling defendant's motion for judgment notwithstanding the verdict.

The Jones Act, 46 U.S.C.A. Sec. 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." Jurisdiction in such actions lies in the court of the district in which the defendant employer resides or in which his principal office is located. The language employed makes it readily apparent that the benefits of the Act are available only to (1) a "seaman" who has been injured in the course of his employment or (2) "the personal representative of such seaman", in the

event the injuries received result in his death, and that the crucial question presented on this appeal is whether Desper, the plaintiff's intestate, was a "seaman" within the meaning of the Act, so as to confer on his personal representative the right to maintain this action.[1] Both parties, however, have advanced arguments which tend to broaden this issue, defendant contending that the fatal accident occurred on non-navigable waters, apparently on the theory that this fact, if true, precludes the maintenance of plaintiff's suit under the Jones Act, and plaintiff urging that the 1939 Amendment to the Federal Employers Liability Act, 53 Stat. 1404, 45 U.S.C.A. Sec. 51, has so enlarged the meaning of the term "seaman", as used in the Jones Act, as to bring within its scope not only one who is "engaged in actual navigation" but also one who is engaged in "work so closely and substantially affecting navigation as to be a part thereof".

That it is wholly immaterial whether the fatal injury suffered by plaintiff's intestate was inflicted on navigable or non-navigable waters, is clear from the decision in *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, in which the Supreme Court, after observing, at page 39, that "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters", concluded, at page 42: "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends *not on the place where the injury is inflicted but on the nature of the service* and its relationship to the operation of the vessel plying in navigable waters. * * * It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, *whether on land or sea*, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle." (Emphasis

[1] Defendant does not deny that Desper's death resulted from injuries sustained in the course of his employment, nor does it contend that, insofar as the question of negligence is concerned, the evidence was insufficient to sustain the verdict against it.

supplied.) In this case, then, plaintiff's right to recover is dependent on the status of the decedent rather than on the situs of the injury which resulted in his death; if Desper was a "seaman" within the meaning of the Jones Act, plaintiff is entitled to maintain this action irrespective of whether his death occurred on navigable or non-navigable waters or even on dry land; if he was not such a "seaman", she is not so entitled even though his death occurred on admittedly navigable waters, but is restricted to the remedy afforded by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 901 et seq. *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 4-7.

In considering plaintiff's contention that the 1939 Amendment to the Federal Employers' Liability Act broadened the meaning of the term "seaman", as used in the Jones Act, the history of that Act and related statutes and the decisions based thereon are enlightening. The Act was passed in 1920, subsequent to the Supreme Court's determination, in *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, that Section 20 of the Seaman's Welfare Act, 38 Stat. 1152,[2] effectuated no change in the general maritime law. The Act's express provision that a seaman injured in the course of his employment might, "at his election, maintain an action for damages at law", and the incorporation therein of "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees", overcame the objection, expressed by the court in the *Chelentis* case, 247 U. S. at page 384, that the earlier legislation disclosed no intention "to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law", and effectively abolished the fellow-servant rule in cases where such election was exercised. In the *Haverty case, International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, Congress' power to change the maritime law by making provision for such an election was recognized, and the court, in construing the act, held that, although for most purposes stevedores are not regarded as seamen, "in this statute, 'seaman' is to be taken to include stevedores employed in maritime work on navigable waters * * *."

[2] "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

Less than a year after the decision in the *Haverty* case, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 901 et seq., providing for the payment of compensation to an employee injured "upon the navigable waters of the United States," but expressly excluding from its coverage "a master or member of a crew of any vessel". In *Frankel* v. *Bethlehem-Fairfield Shipyard, Inc.*, 46 F. Supp. 242, 249, affirmed 132 F. 2nd 634, cert. denied 319 U. S. 746, the court, holding that the Longshoremen's Act "necessarily limits the scope of 'seaman' in the Jones Act to a maritime employee who can be considered the master or member of the crew of a vessel", concluded that the plaintiff in that case could not be classified as a seaman "as his duties had no direct relation to navigation". And in *Swanson* v. *Marra Brothers*, 328 U. S. 1, 7, the Supreme Court adopted the same construction, holding that "the effect * * * of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act." This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the court has retreated from the position taken in the *Haverty* case and has narrowed the Jones Act concept of "seaman" to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters.

Plaintiff, however, while contending that the evidence is sufficient to establish that the decedent was a member of the crew of a vessel and, thus, in any event, a "seaman" within the meaning of the Jones Act, takes the position that the 1939 Amendment to the Federal Employers Liability Act, 53 Stat. 1404, which provides that "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter", considered in conjunction with the Jones Act proviso that statutes "modifying or extending the common-law right or remedy in cases of personal injury to railway

employees" shall apply in actions by seamen, has so broadened the concept of "seaman" as to bring within its scope one whose work "closely and substantially" affects navigation. Plaintiff's theory is that, because any employee of a carrier whose work substantially affects interstate commerce is covered by the Federal Employers Liability Act, it follows that any employee whose work affects navigation is covered by the Jones Act. This position is, we think, unsound, for the Jones Act incorporates only those statutes "conferring or regulating the right of action for death in the case of railway employees" and the 1939 Amendment to the F. E. L. A. is not such a statute, for it is concerned only with the question of the coverage of the Act, with the determination of what "employees" are entitled to its benefits. It is, in short, nothing more than a definition of the term "employee" for the purposes of the F. E. L. A., and cannot reasonably be construed as a redefinition of the term "seaman", as used in the Jones Act.

Defendant contends that the trial court's first three instructions to the jury clearly reflect that court's adoption of the plaintiff's argument that the 1939 Amendment of the F. E. L. A., had the effect of broadening the Jones Act concept of "seaman", and that giving such instructions constituted reversible error. That defendant's contention is not without merit is best illustrated by the quotation of instruction number 1 which reads, in pertinent part:

> "If you believe * * * that a duly licensed operator operating any one of the ferry boats of the defendant * * * during the regular season for such operation, was the crew of said vessel and engaged in actual navigation or in work which was so closely and substantially affected navigation as to be a part thereof, then the court instructs you that operation of said boats by a duly licensed operator * * * would constitute said operator a seaman within the meaning of the * * * Merchant Marine Act; and the court further instructs you that under such circumstances said operator is the crew of the ferry boat.
>
> "The court further instructs you that if you believe * * * that the plaintiff's decedent * * * was employed by the defendant to operate its ferry boats as a licensed operator for the season of

> 1948, and commenced work * * * in March, 1948, aiding in the work of readying and fitting out defendant's said ferry boats * * * for operation on the Illinois River * * * and if you further find * * * that any part of the duties of * * * deceased * * * was the operation of one of said ferry boats as the crew of said vessel on navigable waters and that his work as such operator would be in actual navigation or in work which so closely and substantially affected navigation as to be a part thereof, then you should find that he was subject to the provisions of the Merchant Marine Act * * *."

Furthermore, inasmuch as this instruction is based upon that interpretation of the evidence which is most favorable to plaintiff, it presents the further question whether the court below erred, as defendant insists it did, in failing to find that such evidence was insufficient, as a matter of law, to constitute plaintiff's decedent a "seaman", and in denying defendant's motion for a directed verdict.

In *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136, in *Warner* v. *Goltra*, 293 U. S. 155, 159-60, and again in *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256-257, the Supreme Court has pointed out that the legislative history of the Longshoremen's and Harbor Workers' Compensation Act leads to the conclusion that the term "master or member of a crew of any vessel", as used in that Act, is synonymous with the term "seaman", as used in the Jones Act. In *Swanson* v. *Marra Brothers*, 328 U.S. 1, 7, decided in 1946, some seven years after the enactment of the F. E. L. A. Amendment on which plaintiff relies, the court not only reiterated this conclusion but went a step farther, stating that the effect of the Longshoremen's Act was to "confine the benefits of the Jones Act to the crew of a vessel *plying in navigable waters*". (Emphasis supplied.) The phrase, "plying in navigable waters", is not we believe, to be construed as meaning that the vessel must, at the very moment of the injury, have been actually in motion on navigable waters, but is, rather, to be interpreted as meaning that the person injured must have been a member of the crew of a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation. In the case

at bar, there was no vessel so engaged; all of defendant's boats and barges had been withdrawn from navigation for the winter and laid up in winter quarters, and until such time as they should once again be placed in service, they were not engaged in navigation and plaintiff's decedent, was not, therefore, a "seaman" within the meaning of the Jones Act—*i. e.*, a master or member of the crew of a vessel engaged in navigation. *Swanson* v. *Marra Brothers*, 328 U. S. 1, 7. This conclusion finds support in the decisions rendered in *Hawn* v. *American S.S. Co.*, 107 F. 2nd 999, 1000 (CA-2), where the court, in affirming the trial court's direction of a verdict for the defendant in a case where the plaintiff was injured while employed with others in moving a vessel from one position alongside a dock to another at which it was taking on cargo for storage, stated that, although navigation "does not cease when the ship is in drydock for repairs, awaiting new business", a ship "is withdrawn from navigation, if laid up for the winter", and in *Antus* v. *Interocean S. S. Co.*, 108 F. 2nd 185, 187 (CA-6), where the court, affirming the dismissal of a suit filed under the Jones Act by one who had been a member of the ship's crew and was injured while helping prepare the vessel for winter quarters, stated: "The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature." *Cf. Taylor* v. *McManigal*, 89 F. 2nd 583 (CA-6). Of the cases cited by the plaintiff, the only one which allowed a recovery under the Jones Act where the ship was not in actual navigation, *Hunt* v. *United States*, 17 F. Supp. 578, merely serves to emphasize the factors, lacking in the case at bar, which serve to make one a seaman for the purposes of the Act. In the *Hunt* case, the vessel on which the accident occurred was in drydock undergoing repairs and, thus, was not "withdrawn from navigation" as were the boats involved in the case at bar, which had been "laid up for the winter", *Hawn* v. *American S.S. Co.*, 107 F. 2nd 999, 1000 (CA-2). A second significant difference is that the plaintiff in that case was living on board the vessel and was subject to ship's discipline as a member of the crew.

In the light of the foregoing authorities, we can only conclude that plaintiff's decedent was not, at the time of his death, a "seaman" within the meaning of the Jones Act and that the trial court erred in instructing the jury

and in failing to grant defendant's motion for a directed verdict. Consequently, the judgment is reversed and the cause remanded with directions to enter judgment for defendant.